SUPREME COURT, U. S.

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1968

No. 774

BROTHERHOOD OF LOCOMOTIVE FIREMEN AND ENGINEMEN, - - - - - Petitioner,

versus

LOUISVILLE AND NASHVILLE RAILROAD COMPANY, and
BROTHERHOOD OF LOCOMOTIVE ENGINEERS, - - - - - - - - Respondents.

B. A. TURNER, ET AL., and
BROTHERHOOD OF LOCOMOTIVE FIREMEN AND ENGINEMEN, - - - - - Petitioners,

versus

LOUISVILLE AND NASHVILLE RAILROAD COMPANY, and
BROTHERHOOD OF LOCOMOTIVE ENGINEERS, - - - - - - - - Respondents.

BRIEF OF LOUISVILLE AND NASHVILLE RAILROAD COMPANY IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

(See Inside of Cover for List of Attorneys)

WESTERFIELD-BONTE CO., INCORPORATED, LOUISVILLE, KY.

JOHN A. SANDIDGE,
WOODWARD, HOBSON & FULTON,
1806 Kentucky Home Life Building,
Louisville, Kentucky 40202,

PHILIP M. LANIER,
JOSEPH L. LENIHAN,
MARVIN E. JONES,
EUGENE W. REETZ,
DAVID M. TRABWOOD,
900 West Broadway,
Louisville, Kentucky 40201,

Counsel for Louisville and Nashville Railroad Company.

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BRIEF OF LOUISVILLE AND NASHVILLE RAILROAD COMPANY IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

OPINIONS BELOW.

The petition in No. 774 in this Court involves two separate suits, being Civil Action Nos. 5402 and 5829 filed in the United States District Court for the Western District of Kentucky. The opinions of the District

Court, in the form of Findings of Fact and Conclusions of Law, dated July 5, 1966 and January 23, 1968, respectively, are not reported but are a part of the original record before this Court (R. No. 5402, Doc. 19, pp. 1-4; R. No. 5829, Doc. 19, pp. 1-10, with Appendices A through D).[1]

Each of the two cases was appealed separately, being Nos. 17,588 and 18,479, respectively, in the United States Court of Appeals for the Sixth Circuit. They were later consolidated for purposes of hearing by the Court of Appeals, and the opinion of the Court of Appeals is reported in 400 F. 2d 572.

JURISDICTION OF THE COURT.

Jurisdiction of this Court to review the decision of the United States Court of Appeals for the Sixth Circuit, entered August 28, 1968, by means of a writ of certiorari is contained in 28 U. S. C. § 1254(1).

STATUTES INVOLVED.

The Railway Labor Act, most of the pertinent sections thereof being printed in the petitioners' appendix (A. 38-41) and an additional section thereof being printed in this respondent's appendix, p. 61, *infra*.

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[1]All references are to the original records of both Civil Action No. 5402 and No. 5829, both of which are before this Court as No. 774 and the original records of which have been filed with the Clerk of this Court pursuant to Rule 21. The pages of the original records are not numbered individually but the Clerk of the District Court did number each document of record. Thus, our record references shall show the civil action involved, the document number and then the page or pages of the document referred to. When an exhibit is involved, the exhibit number or letter will be cited.

COUNTER-STATEMENT OF QUESTIONS PRESENTED FOR REVIEW.

1. Where the complaints of the Brotherhood of Locomotive Firemen and Enginemen (BLF&E) against the Louisville and Nashville Railroad Company (L&N) and the Brotherhood of Locomotive Engineers (BLE) present a direct attack upon a training program for apprentice locomotive engineers involving L&N and BLE, the duly authorized representative of the craft or class of locomotive engineers employed by the L&N and certified as such by the National Mediation Board, and inextricably involve a dispute between the BLE and BLF&E as to which of those organizations has the statutory right to bargain for and in behalf of apprentice locomotive engineers and a dispute concerning the proper interpretation of collective bargaining agreements, does the District Court have jurisdiction of the subject matter of the complaints and is the controversy justiciable as one being appropriate for judicial determination?

2. Does the District Court have jurisdiction to decide the merits of a jurisdictional dispute between the two competing railway unions?

COUNTER-STATEMENT OF THE CASE.

In order that this Court may view the present case in true perspective, we present, as summarily as possible, the facts which gave rise to the filing of each of the complaints below. In this regard, there has been much other litigation among the same parties which

has a real and direct bearing on the present case. Pertinent background is supplied by reported findings of several courts which have decided a series of cases involving the same parties here. Please see initially: *Brotherhood of Locomotive Engineers, et al.* v. *Baltimore & Ohio R. Co., et al.*, 310 F. 2d 503 (C. A. 7, 1962), aff'd. 372 U. S. 284, and *Brotherhood of Locomotive Firemen & Enginemen, et al.* v. *Chicago, Burlington & Quincy R. Co., et al.*, 225 F. Supp. 11 (D.C. D.C., 1964), aff'd. 331 F. 2d 1020 (C.A. D.C., 1964), cert. den. 377 U. S. 918. In addition, the District Court took judicial notice of a series of cases in that Court which involved the same parties, which cases also constitute an important part of the present dispute. We present all these events chronologically, insofar as possible.

The Abolishment of Unnecessary Positions of Locomotive Firemen pursuant to Public Law 88-108 and the Award of Arbitration Board No. 282.[1]

The present dispute had its genesis at least by November 2, 1959, when the nation's railroads, including the L&N, served the railroad operating unions, including the BLE and BLF&E, with notices under Section 6 of the Railway Labor Act (45 U.S.C. § 156). These notices proposed the elemination of obsolete agreement rules requiring the use of firemen on locomotives (other than steam powered) in freight and yard service. Counter-proposals were served by the unions which proposed the use of a fireman on all locomotives.

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[1](R. No. 5402, Doc. 9, Ex. B.)

After unsuccessful negotiations by the parties, the President, by Executive Order 10891, on November 1, 1960, appointed a Presidential Railroad Commission to investigate the controversy and use its best efforts to bring about a settlement. This fifteen-member commission began its hearings on February 16, 1961, and delivered its report and recommendations to the President on February 28, 1962.[1] The commission recommended that rules requiring the use of firemen be abrogated and that, subject to measures for the protection of men already employed, the carriers should be permitted to discontinue firemen's assignments (pp. 48-50). In regard to retaining firemen as the future source of engineers, the Commission stated (p. 45):

> "Engineers have almost universally been promoted from the ranks of firemen who pass qualifying examinations. This fact does not, in itself, however, compel the conclusion that the fireman's job should be retained."

The recommendations of the Presidential Railroad Commission were accepted by the carriers but were rejected by the Unions. Efforts by the National Mediation Board to mediate the dispute were also unsuccessful, and that Board terminated its services on July 16, 1962, after the unions refused a proffer of arbitration under Sections 7 and 8 of the Railway Labor Act (45 U.S.C. §§ 157 and 158). The carriers then served notice that they intended to put their

[1]There were 15,500 pages of oral testimony and thousands of pages of exhibits received by the Commission. The Commission also made numerous studies independently of the parties, and was assisted in its work by a staff of independent technical experts.

proposals into effect, and the unions resorted to litigation aimed at preventing that from being done. In *Locomotive Engineers, et al.* v. *Baltimore & O. R. Co., et al.,* 310 F. 2d 503 (C. A. 7, 1962), aff'd. 372 U. S. 284, this Court reviewed these events and held that the November 2, 1959 Section 6 Notices served by the carriers were valid and the carriers were then free to put them into effect, subject to the possible creation of an emergency board under Section 10 of the Railway Labor Act (45 U.S.C. § 160).

A *second* impartial study in respect to the fireman issue was made by the emergency board later appointed by the President under Section 10. The Report to the President by Emergency Board No. 154, submitted on May 13, 1963, contained recommendations which generally paralleled those made by the Presidential Railroad Commission, except for a suggestion that a special board procedure be utilized in resolving disputes over the use of firemen. These recommendations were accepted by the railroads, but rejected by the unions.

When it became apparent that a disastrous strike was imminent, the President proposed preventive legislation and Congress responded by enacting Public Law 88-108 (45 U.S.C.A. § 157, 1966 Pocket Part). Under the provisions of Public Law 88-108, the fireman issue was to be submitted to arbitration and the arbitration award was to constitute a "complete and final disposition" of the notices involving the fireman issue. The arbitration board was established, with the neutral members from the public being appointed by the President, and is known as Arbitration Board 282. Thus, a

third impartial study of the fireman issue began. After a continuous series of hearings, its Award was filed on November 26, 1963. By the terms of the statute, the Award was to become effective on January 25, 1964, and continue in effect for two years. The validity of Award No. 282 was upheld in *Brotherhood of Locomotive Firemen & Enginemen, et al.* v. *Chicago, Burlington & Quincy R. Co., et al.*, 225 F. Supp. 11 (D.C. D.C., 1964), aff'd. per curiam, 331 F. 2d 1020 (C.A. D.C., 1964), cert. den. 377 U. S. 918, and an excellent summary of the Award appears in the Opinion of the District Court (pp. 16-17).[1] We summarize the pertinent findings of Arbitration Board 282 and its Award.

Section II of the Award modified the existing rules governing the use of firemen so as to permit the eventual elimination of firemen positions on all but 10% of the diesel locomotives in freight and yard service. These remaining firemen positions are commonly referred to as "veto positions." Generous provisions were provided, however, for existing employees. In general, firemen who had less than two years' seniority as of the effective date of the Award could be separated from employment upon the payment of substantial separation allowances, this category of firemen being known as C(2) firemen because of the paragraph of the Award dealing with them. Those firemen with between two and ten years seniority (known as C(6) firemen) could be offered comparable jobs (with five-year guarantees against any reduction in wages and for the payment of relocation expenses) and, if they refused

[1]This Award is also part of the record here (R. No. 5402, Doc. 9, Ex. B).

to accept such comparable jobs offered to them, they could be separated upon the payment of substantial separation allowances. Those firemen with ten years or more of seniority (known as C(7) firemen) were to be retained in the service until they retired, were discharged for cause or otherwise were removed from employment by attrition.[1]

The abolishment of many unnecessary firemen positions on the L&N was accomplished in 1964 in an effective and humane manner. The L&N found comparable positions for many of its existing firemen. Only one C(6) fireman elected to leave its service and take the separation allowance provided by the Award. Although not required by the Award to do so, the L&N re-employed approximately 70% of its C(2) firemen in other positions with the Company after they had been separated from L&N service as firemen and paid generous separation allowances, many of them having been reemployed as brakemen and switchmen and in other crafts (R. No. 5829, Doc. 10, pp. 9, 15-16).

In 1964, the L&N encouraged the retirement of a number of its older firemen and engineers who had already reached the retirement age of 65 or were closely approaching it, by individually offering a very generous separation payment to them. This plan was accepted on an individual basis by a number of its older employees who heartily welcomed it. This also benefited L&N's more junior engineers who moved up

[1]As of March 30, 1966, the railroads had reduced the number of firemen in their employ by about 18,000, and had paid approximately $36,000,000 in separation allowances. *Bangor & Aroostook R. Co.* v. *Brotherhood of L. Enginemen & Firemen*, 253 F. Supp. 682, 685 (D.C. D.C., 1966).

on the seniority rosters to better positions and earnings, and it benefited other existing firemen by making available to them an opportunity to advance to engineers, if qualified (*Ibid.*, pp. 15-16). These separation payments were accorded without regard to any union affiliation (*Ibid.*, p. 16). It also benefited the L&N because it helped to hasten attrition and required it to employ fewer firemen. The L&N spent approximately $2,675,000 pursuant to this plan, which was voluntary on the part of all involved (*Ibid.*, p. 16).

The BLF&E Section 6 Notice of March 25, 1965, to Establish an Apprentice Program on the L&N and the Response of the BLE to The Notice.

On March 25, 1965, the BLF&E served the L&N with a Section 6 Notice demanding that the L&N negotiate with the BLF&E concerning the adoption of a training program for apprentice locomotive engineers[1] (R. 5402, Doc. 16, Ex. A, pp. 1-6; R. 5829, Doc. 10, p. 7). Similar demands were subsequently served by the BLF&E on most of the other railroads of the nation on November 15, 1965 (R. 5402, Doc. 16, pp. 4-5; R. 5829, Doc. 10, p. 7). These Section 6 Notices served by the BLF&E constitute the real crux of the present disputes.

The BLE took the position that the Section 6 Notice of the BLF&E infringed upon the statutory rights of

[1]The parties are in disagreement concerning the import or the proper interpretation of the BLF&E Section 6 Notice. While the BLF&E refers to the notice in its brief (p. 4) as involving only an apprentice program for firemen, the BLE insists that it is a proposed apprentice program for locomotive engineers. We think the BLE is correct and we propose to discuss this in a subsequent part of this brief (pp. 26, 53-54, *infra.*).

the BLE, the duly designated representative for the craft of locomotive engineers on the L&N, and the carrier was informed that the BLE would enforce its statutory rights through appropriate legal measures, including calling a strike, if necessary (R. No. 5402, Doc. 16, p. 5, Ex. B; R. No. 5829, Doc. 10, pp. 7, 18).

L&N's Efforts to Qualify its Existing Firemen for Promotion to Engineer and the BLF&E's Actions in Frustrating Such Efforts.

In 1965, the L&N began experiencing a shortage of qualified engineers (R. No. 5829, Doc. 10, p. 7). L&N attempted to satisfy this need for locomotive engineers by the examination of firemen to determine their qualifications for promotion to engineers (*Ibid.*, Doc. 10, pp. 7-8). The BLF&E protested the L&N's attempt to qualify a number of its existing firemen for eventual promotion, claiming that the L&N was violating Paragraph 20 of Article 26 of the L&N-BLF&E agreement which reads (R. 5829, Doc. 10, p. 8): "Firemen will not be promoted to positions as engineers unless they have had at least 3 years' road experience." The L&N was of the opinion that this provision, originally adopted at the carrier's insistence, could be waived by the carrier in individual cases as had been done in the past. In any event, the L&N's position was that this provision did not relate to the giving of examinations and the qualifying of the firemen as engineers but related only to the timing of promotions (R. 5829, Doc. 10, p. 8). Nevertheless, the BLF&E was so adamant in its position that, in August 1965, it threatened to strike.

Thereupon, the L&N submitted this particular dispute to the National Railroad Adjustment Board, where it presently is pending. Shortly thereafter, the BLF&E commenced an action to maintain the *status quo* in respect to this particular dispute so as to prevent the continued efforts of the L&N to examine firemen looking toward their promotion to engineers until the Adjustment Board decided the dispute. This suit is styled *Brotherhood of Locomotive Firemen & Enginemen* v. *Louisville & N. R. Co.,* and is Civil Action No. 5134, U. S. District Court, Western District of Kentucky, at Louisville (R. 5829, Doc. 10, Ex. A, pp. 1-7). The District Court (Hon. James F. Gordon) entered a temporary restraining order on October 1, 1965, which applies to two seniority districts where approximately 20% of the carrier's engine service employees are assigned. The restraining order became a temporary injunction by consent without further hearing on February 4, 1966 (R. 5829, Doc. 10, p. 8). This action by the BLF&E delayed the examination and promotion of a number of L&N firemen, and will continue to delay the examination and promotion of some additional firemen unless and until the dispute is finally decided in the L&N's favor by the Adjustment Board.[1]

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[1]The action taken by the BLF&E in September of 1965 in protesting and resisting the L&N's action in its efforts to examine and qualify a number of its existing firemen for promotion to engineers was unprecedented on the L&N. The sole interest of the L&N was in having a sufficient number of qualified locomotive engineers to meet the needs of its service in both the immediate and reasonably foreseeable future and union affiliation or lack of it played no part in this. A fireman *or* an engineer may be a member of the BLE *or* the BLF&E, as he may desire. Also, since

(Footnote continued on following page)

The Litigation Deciding the Dispute Concerning the Continued Effect of the Award of Board 282 Under Public Law 88-108.[1]

In *Bangor & Aroostook R. Co.* v. *Brotherhood of L. Firemen & Enginemen,* 253 F. Supp. 682 (D.C. D.C., 1966), the District Court held that the modifications in the carriers' working rules made by the Award pertaining to the employment of firemen and actions taken thereunder created a new status which is to be maintained after the expiration of the Award and until changed by agreement or until the procedures of the Railway Labor Act have been exhausted with respect to valid Section 6 Notices proposing changes in the status thus created. The Court held that, unless otherwise agreed to by the parties, the railroads need not use firemen on engines (other than steam powered) in freight and yard service except as required by Award 282.[2]

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there are no union-shop agreements on the L&N with respect to either of these two crafts, a fireman or an engineer may elect not to be a member of either union (R. No. 5829, Doc. 10, p. 6). Thus, it is manifestly clear, and it has remained undisputed, that the L&N's action in examining and qualifying its existing firemen in the operation of locomotives would not have required a single fireman to drop any membership he may have had in the BLF&E.

[1]We refer to *Bangor & Aroostook R. Co.* v. *Brotherhood of Locomotive Firemen & Enginemen,* 253 F. Supp. 682 (D.C. D.C., 1966), affirmed in part pertinent here *sub. nom. Brotherhood of Railroad Trainmen* v. *Akron & Barberton Belt R. Co.,* 385 F. 2d 581 (C.A. D.C., 1967), cert. den. 390 U. S. 923 (1968).

[2]While the Court of Appeals reversed the District Court as to certain points not pertinent here, it affirmed the ruling of the District Court to the effect that, contrary to the contentions of the Unions, the status created during the 2-year period of the Award was not automatically eroded at the end of that period (385 F. 2d 581, 593-594).

The Apprentice Locomotive Engineer Program Established on the L&N in April, 1966.

Although the BLF&E was still insisting upon the handling of its Section 6 Notice served on the L&N on March 25, 1965 for an apprentice program, the jurisdictional dispute between the BLE and BLF&E concerning the notice remained very much alive at all times.[1] By April of 1966, the L&N's need for qualified locomotive engineers was becoming more acute and it could not await the eventual resolution of the jurisdictional dispute between the two unions (R. No. 5829, Doc. 10, pp. 7, 9, 11). Since the BLF&E had thwarted the L&N's efforts to examine a number of its firemen for eventual promotion to engineers, in order to satisfy its need for engineers, in April of 1966, the L&N, with the cooperation of the BLE, began an apprentice engineer program. During the period of their instruction and training, apprentice locomotive engineers are paid at a rate established by an agreement dated April 28, 1966, between the L&N and the BLE (R. No. 5402, Doc. 9, Ex. A). By this training program *and* by the promotion of qualified firemen where not prevented by the BLF&E, the L&N has been satisfying its operational needs for locomotive engineers (R. No. 5829, Doc. 10, pp. 5, 9).

[1]By the service of similar BLF&E Section 6 Notices on most of the other railroads of the nation on November 15, 1965, this jurisdictional dispute between the BLF&E and BLE has become an enlarged one (R. No. 5829, Doc. 10, p. 18).

Carrier's Efforts to Resolve the Jurisdictional Dispute Between the BLF&E and BLE.

On June 6, 1966, the nation's carriers, including the L&N, filed an application before the National Mediation Board pursuant to Section 5, First (45 U.S.C. § 155, First) seeking to have that Board determine which of the two disputing unions (the BLE or the BLF&E) may legally bargain for and on behalf of apprentice locomotive engineers (R. No. 5402, Doc. 16, Ex. B). After an exchange of correspondence between all parties (the carriers, BLF&E and BLE) with the Board (R. No. 5402, Doc. 16, Ex. B, C), on June 21, 1966, the Board denied the carriers' request for its services, stating that "the question posed involved a question of representation. Such issues are resolved under Section 2, Ninth, of the Railway Labor Act" (R. No. 5402, Doc. 16, Ex. B; R. No. 5829, Doc. 10, p. 19).[1]

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[1]A carrier has no standing or right to institute a proceeding before the National Mediation Board under Section 2, Ninth, involving a jurisdictional dispute between two unions. *Railway Clerks* v. *Employees Association,* 380 U. S. 650 (1965).

The Institution of Civil Action No. 5402 By the BLF&E Against the L&N; BLE's Intervention in the Suit and BLE's Efforts to Have the National Mediation Board Decide the Jurisdictional Dispute Between the Two Unions.

On June 27, 1966, the BLF&E commenced Civil Action No. 5402 in the United States District Court, Western District of Kentucky, at Louisville, by which it sought to permanently enjoin the L&N from continuing the apprentice engineer program (R. No. 5402, Doc. 2, pp. 1-7). On the same day, the BLF&E obtained a temporary restraining order (*Ibid.*, Doc. 5, pp. 1-2).

On June 30, 1966, the BLE sought to invoke the services of the National Mediation Board pursuant to Section 2, Ninth, to determine which union, the BLE or the BLF&E, represents apprentice locomotive engineers on the L&N (*Ibid.*, Doc. 16, Ex. D). A hearing on the motion for a temporary injunction and other motions was held in Civil Action 5402 on July 2, 1966 (*Ibid.*, Doc. 17, pp. 1-2; Supp. Rec., TR., pp. 1-37), at which time Judge Gordon announced his ruling from the bench and ordered the submission of formal Findings of Fact and Conclusions of Law (*Ibid.*, Doc. 17, pp. 1-2). The BLE was permitted to intervene and, on July 5, 1966, the Court's Findings of Fact, Conclusions of Law and Judgment were entered in Civil Action No. 5402 (*Ibid.*, Doc. 18, 19).

The District Court concluded (*Ibid.*, Doc. 19, pp. 3-4):

> "By virtue of the foregoing Findings of Fact, the Court concludes as a matter of law that this action involves a controversy between BLF&E and BLE, each of which is a labor organization within the meaning of the Railway Labor Act, as to which of those organizations is the exclusive bargaining representative for and in behalf of the apprentice locomotive engineers employed by the L&N and this Court has no jurisdiction to determine that controversy, the determination of which is exclusively within the jurisdiction of the National Mediation Board. *Brotherhood of Ry. & S. S. Clerks* v. *United Air Lines,* 325 F. 2d 576 (C. A. 6, 1963)."

Accordingly, the restraining order was dissolved and this action was dismissed on July 5, 1966 (*Ibid.*, Doc. 18, 19).

On July 5, 1966, the BLE wrote to the Mediation Board supplementing its earlier telegraphic invocation of the Board's services pursuant to Section 2, Ninth of the Railway Labor Act (45 U.S.C. § 152, Ninth). The Board requested statements from the L&N and the BLF&E concerning the dispute and, on July 11, 1966, the L&N advised the Board that, in the carrier's opinion, the BLE represents apprentice locomotive engineers on the L&N and that the L&N had accordingly entered into an agreement with the BLE relative to such apprentices (A-34, Petitioners' Appendix).

On July 13, 1966, Mr. H. E. Gilbert, President of the BLF&E, wrote the Mediation Board and, while taking the position there that the BLE was attempting

to extend its rights into the firemen's craft, took the position that the Mediation Board should deny the BLE's application for the Mediation Board to decide the dispute between the two unions (A-34; R. No. 5829, Doc. 10, p. 20).

On July 14, 1966, the BLF&E filed a motion for rehearing and new trial in Civil Action No. 5402 (R. No. 5402, Doc. 21, 22). The District Court permitted time for filing of briefs and set the motion for oral argument on September 29, 1966 (*Ibid.*, Doc. 23-26).

On July 22, 1966, the Executive Secretary of the National Mediation Board wrote the parties, in pertinent part, as follows (A. 34-36):

> "In the present situation, it is clear that the Brotherhood of Locomotive Engineers has been certified by the National Mediation Board, Case No. R-3225, Certification issued December 31, 1957, as the representative of the craft or class of Locomotive Engineers, employees of the Louisville and Nashville Railroad Company. Neither the carrier nor the Brotherhood of Locomotive Firemen and Enginemen dispute this fact.
>
> "It is also clear that the carrier has recognized the Brotherhood of Locomotive Engineers as the representative of the Apprentice Locomotive Engineers, employees of the L&N Railroad and have entered into an agreement with that organization relative to such apprentices.
>
> "Careful scrutiny of the statements received from the Brotherhood of Locomotive Firemen and Enginemen fails to reveal a position that a representation dispute exists.
>
> . . . . . .

> ". . . After full consideration of the request and the arguments of the parties in support of their contentions, the Board concludes and hereby finds that no dispute within the meaning of Section 2, Ninth, of the Act exists and that the application of the Brotherhood of Locomotive Engineers should be and is hereby dismissed."

Thus, at the time of the oral hearing on September 29, 1966, on the BLF&E's motion for rehearing and new trial in Civil Action No. 5402, the District Court was aware of the Mediation Board's dismissal of the BLE's application. The District Court, nevertheless, adhered to its first opinion that the crux of the dispute was a jurisdictional one between the two Unions and that the federal courts have no jurisdiction to decide such disputes. Accordingly, the District Court, after having received briefs and having heard oral arguments, entered its order of September 29, 1966, overruling the BLF&E's motion for rehearing and new trial (R. No. 5402, Doc. 27).

The BLF&E then filed its Notice of Appeal in Civil Action No. 5402, and this case became No. 17,588 in the Court of Appeals for the Sixth Circuit (*Ibid.*, Doc. 28).

The Institution of Civil Action No. 2060-66 in the United States District Court for the District of Columbia by the BLE against the National Mediation Board, the BLF&E, the L&N and Other Named Carriers.[1]

After the National Mediation Board dismissed the application of the BLE to decide the jurisdictional dispute between the BLE and BLF&E, the BLE, on August 4, 1966, instituted Civil Action No. 2060-66 in the United States District Court for the District of Columbia. Named as defendants in this civil action were the National Mediation Board, BLF&E, L&N and five other railroad carriers. The BLE alleged in its complaint that, by the BLF&E's Section 6 Notice served upon the L&N on March 25, 1965 and served upon the other railroads on November 15, 1965, the BLF&E was attempting to invade the craft jurisdiction held exclusively by the BLE by virtue of the BLE's certification as the duly authorized collective bargaining representative for the craft or class of locomotive engineers and that the BLF&E's Section 6 Notices were invalid. The BLE sought, among other things, a mandatory injunction to compel the National Mediation Board to exercise and fulfill the obligations

[1]We refer now to *Brotherhood of Locomotive Engineers* v. *National Mediation Board, et al.*, the District Court's Findings of Fact and Conclusions of Law entered April 26, 1968, being reported at 284 F. Supp. 344. The District Court ruled, among other things, that the jurisdictional dispute which existed between the BLE and BLF&E was one for the National Mediation Board pursuant to its power and duty under Section 2, Ninth of the Railway Labor Act (45 U.S.C. § 152, Ninth) and the Court directed the Mediation Board to take jurisdiction and decide the dispute. The case is presently on appeal in the Court of Appeals for the District of Columbia.

imposed upon the Board by Section 2, Ninth of the Railway Labor Act (45 U.S.C. § 152, Ninth), that is, to determine the jurisdictional dispute between the BLE and BLF&E and decide which labor organization has the right to bargain for apprentice locomotive engineers on the defendant railroads. The BLE also sought to enjoin all negotiations concerning such Section 6 Notices until the National Mediation Board determined the jurisdictional dispute between the BLE and the BLF&E (R. No. 5829, Doc. 9, Ex. A).

BLF&E's Attempt to File a "Supplement and Second Amendment to Complaint" in Civil Action No. 5134, U. S. District Court for the Western District of Kentucky.

The BLF&E, in August of 1967, attempted, for the second time, to have the United States District Court for the Western District of Kentucky litigate the dispute arising out of the April 28, 1966, L&N-BLE apprentice engineer agreement and the implementation of this apprentice engineer training program. It was on or about August 18, 1967, when the BLF&E sought leave of court to file a "Supplement and Second Amendment to Complaint" in Civil Action No. 5134 in that Court at Louisville, Kentucky (R. No. 5829, Doc. 19, Ex. C). The L&N objected to the filing of such a proposed pleading and the BLE sought leave of court to intervene in the suit. Arguments on all pending motions were heard by the Court on September 28, 1967, and the District Court, again relying upon the principles of the decision in *Brotherhood of Ry. & S. S.*

Clerks v. *United Air Lines*[1] and cases cited therein, looked to the substance of this BLF&E pleading and the relief sought therein and held that the real controversy involved a jurisdictional dispute between the two Unions; that the proposed amendment to the complaint involved the lawfulness of the apprentice engineer program, the validity of which depended entirely upon the resolution of the jurisdictional dispute, and that the jurisdictional dispute was one for administrative, not judicial, determination (R. No. 5829, Doc. 19, App. D). The District Court recognized that the prior suit (Civil Action No. 5402; Appeal No. 17,588) was cast in the form of an action under Section 2, Seventh of the Railway Labor Act and that the proposed amendment in Civil Action No. 5134 was cast in the form of an action under Section 2, Third and Fourth of that Act. Judge Gordon stated (R. No. 5829, Doc. 19, App. D, pp. 4-5):

> "As this Court sees it, the matter sought to be injected now in action 5134 was the matter heretofore adversely determined to the firemen in its case now under appeal. As I see it the gist of the issue is the same, that is, the apprentice engineer training program.
>
> "Its rightful existence and who is the proper representative and from whence the personnel shall come are matters of administrative, not judicial, determination. Once determined administratively, then action by the BLF&E vs. the railroad alleging violation of 2-3rd and 4th or 2-7th

[1]This case is reported at 325 F. 2d 576 (C. A. 6, 1963), and is discussed in this brief (pp. 35-36, *infra*.)

would of course find instantaneous receipt by this Court for relief, for only then does the judicial remedy become plain, the enforceable obligation having become fixed, but this Court has no jurisdiction to determine the craft dispute. Accordingly, IT IS ORDERED that the motion for leave to file the supplemental complaint is overruled."

The Institution of Civil Action No. 5829 by the BLF&E Against the L&N and the BLE.

On December 22, 1967, the BLF&E instituted Civil Action No. 5829 in the United States District Court for the Western District of Kentucky, at Louisville (R. No. 5829, Doc. 2). The complaint in this action purports to present the same cause of action as presented a few months earlier in the proposed "Supplement and Second Amendment to Complaint" in Civil Action 5134. Actually, the two complaints are substantially the same except that in this new suit some individuals have been joined as plaintiffs and the BLE is also named as a defendant. The BLF&E filed a motion for a preliminary injunction (*Ibid.*, Doc. 8). The L&N filed its answer (*Ibid.*, Doc. 10) and filed a motion to dismiss (*Ibid.*, Doc. 6). The BLE also answered (*Ibid.*, Doc. 9) and also filed a motion to dismiss (*Ibid.*, Doc. 5).

Arguments were heard by the District Court (Hon. James F. Gordon) on January 8, 1968. The Court again recognized the complaint as one attempting to get the Court to decide the merits of the jurisdictional dispute between the two unions since such a dispute was the *very essence* of the controversy (A. 37). The

Court announced its rulings, both orally (R. No. 5829, Doc. 15) and in a written order entered January 8, 1968 (*Ibid.*, Doc. 11), that the Court's earlier Opinions in Civil Actions Nos. 5134 and 5402 were dispositive of the current suit, that the complaint did not present a justiciable controversy for the Court, and that the Court was without jurisdiction, and sustained the motions to dismiss the complaint (*Ibid.*, Doc. 11).

Findings of Fact and Conclusions of Law were served and tendered by both the BLF&E and the L&N (*Ibid.*, Doc. 16, 17) and a further hearing was held concerning them on January 23, 1968, after which the Court entered its Findings of Fact, Conclusions of Law and Judgment (*Ibid.*, Doc. 19) from which the BLF&E appealed (*Ibid.*, Doc. 20).

The two cases appealed by the BLF&E (Civil Action No. 5402, which became Appeal No. 17,588, and Civil Action No. 5829, which became Appeal No. 18,479), although separately briefed in the Court of Appeals, were consolidated for argument in that Court and decided together. Both cases are included in No. 774 in this Court.

SUMMARY OF ARGUMENT.

The petition for a writ of certiorari should be denied because the Courts below correctly determined that the complaints presented a direct attack upon the validity of the L&N-BLE apprentice engineer agreement and program, the validity of which depends entirely upon the resolution of a jurisdictional dispute between the BLE and BLF&E. The Courts below correctly held that such a jurisdictional dispute is one for administrative determination, and that the federal courts have no jurisdiction to decide the merits of such a dispute.

There can be no real doubt about the fact that a serious dispute exists between the BLE and the BLF&E as to which organization has jurisdiction to represent apprentice locomotive engineers employed by the L&N. Completely underlying each of the complaints below, and inextricably the *vital* part of them, is this jurisdictional dispute between the two unions.

This Court, in *General Committee* v. *Missouri-Kansas-Texas R. Co.*, 320 U. S. 323 (1943), defined the term "jurisdictional dispute" as (pp. 334-335):

> ". . . . an asserted overlapping of the interests of two crafts. It necessitates a determination of the point where the authority of one craft ends and the other begins or of the zones where they have joint authority."

Since April of 1966, the L&N has been satisfying its need for locomotive engineers from two sources: (1) by

the training, examining, qualifying and promoting existing L&N firemen to locomotive engineers *and* (2) by the engineer apprentice training program between the L&N and the BLE, the latter labor organization being the duly designated collective bargaining representative for the craft or class of locomotive engineers on the L&N and certified as such by the National Mediation Board (R. No. 5402, Doc. 19, p. 2). The BLE recognizes both of these sources as valid. However, the BLF&E aspires to represent to the *complete exclusion* of the BLE *every* individual who would become a locomotive engineer on the L&N and to establish the standards and qualifications of a locomotive engineer. The BLF&E has been persistent in its efforts to get the District Court to adjudge as invalid and to enjoin the entire apprentice engineer program between the L&N and BLE, and the BLF&E has been equally persistent in dodging and resisting any administrative determination of the dispute.

The BLF&E contends that the BLE has extended its rights into the firemen's craft; that this was commenced with the L&N-BLE apprentice engineer program in April of 1966; and that the L&N has wrongfully declined to negotiate with the BLF&E concerning its Section 6 Notice of March 25, 1965, concerning the adoption of a training program for apprentice locomotive firemen. (Please see pp. 9-10, *supra.*) The BLF&E Section 6 Notice of March 25, 1965, is in reality a proposal to negotiate an apprentice locomotive engineer training program agreement (R. No. 5402, Doc. 9, Ex. A. pp. 1-7). Although BLF&E contends

that its Section 6 Notice is merely one for the purpose of training firemen, we believe that an examination of this BLF&E Section 6 Notice by the Court will satisfy it that what is really proposed is an agreement pertaining to the training of apprentice locomotive engineers. It is designated as an "Apprenticeship Training, Qualification and Promotion Program for Engine Service Employees" (*Ibid.*, p. 1). There is no separate and individual craft or class of employees known as "engine service" employees. "Engine Service" employees include both firemen *and engineers.* The Section 6 Notice patently seeks to establish an apprenticeship training program for one to become an engineer. Euphemistic titles of "student locomotive helper, locomotive helper trainee and locomotive helper (qualifying for promotion)" are used in the Section 6 Notice. Article C of the Notice provides that these terms are synonymous with the term "firemen" (*Ibid.*, pp. 6-7). However, a locomotive helper (qualifying for a promotion) is one undergoing final stages of training to qualify for promotion to locomotive engineer (*Ibid.*, pp. 5-7), and when he completes such training, Article E of the Notice provides that he shall receive a seniority date as a locomotive engineer (*Ibid.*, p. 7). We submit that, stripped of its obscurantist titles, this Section 6 Notice pertains to an apprenticeship training program for locomotive engineers.

The BLE, on the other hand, contends that, as the duly certified representative of the craft or class of locomotive engineers on the L&N, it has the *statutory*

right to negotiate and formulate with the carrier the standards for qualifying locomotive engineers and the training for attaining such status. In fact, as we have pointed out previously herein (pp. 9-10), the BLE notified the L&N that the BLF&E Section 6 Notice infringed upon the statutory rights of the BLE and that the BLE would enforce its statutory rights through appropriate legal measures, including calling a strike, if necessary.

When each of two labor organizations claims that the other is seeking to expand its authority into an area of craft composition or authority claimed for itself, as here, there is presented a classic case of a jurisdictional dispute. Also, insofar as the BLF&E's claim to exclusivity is seriously contended to derive from its collective bargaining agreements with the L&N, a contention which we emphatically dispute,[1] there is also involved a dispute, equally a jurisdictional one, concerning the proper interpretation of the collective bargaining agreements.

The District Court was not precluded from looking through form to substance in determining the real nature of the controversy before it. *Brotherhood of Ry. Clerks* v. *United Air Lines, Inc.,* 325 F. 2d 576 (C.A. 6, 1963), cert. granted 377 U. S. 903 (1964), cert. dismissed as improvidently granted 379 U. S. 26 (1964). The District Court also properly took judicial notice of the prior litigation before it involving the same parties. *Cf. Howard* v. *St. Louis-San Francisco Ry. Co.,* 361 F. 2d 905 (C.A. 8, 1966), cert. den. 385 U. S. 986 (1966). The District Court also had the right to

[1]This subject is dealt with in some detail at pages 45-52, *infra.*

rely upon undisputed statements of counsel made to the Court concerning the proceedings involving the same parties before the National Mediation Board and the United States District Court for the District of Columbia in Civil Action No. 2060-66. *Oscanyan* v. *Arms Company,* 103 U. S. 261 (1880), cited and relied upon in *Rhoades, Inc.* v. *United Air Lines, Inc.,* 340 F. 2d 481 (C.A. 3, 1965); *United States Hoffman Machinery Corp.* v. *Richa,* 78 F. Supp. 969 (W.D. Mo., 1948). The District Court was also cognizant of the general background of the national "work-rules" dispute as reflected in reported decisions of other federal courts involving the same parties and previously discussed herein (pp. 4-9, 12-13).

The complaints in both civil actions are founded upon an incorrect assumption by the BLF&E that it has the *exclusive* right to bargain with the L&N in respect to apprentice engineers and in setting of standards and qualifications of locomotive engineers.

In the July 2, 1966, hearing before the Court in Civil Action No. 5402, and in referring specifically to the L&N-BLE apprentice engineer agreement, BLF&E counsel candidly stated (Supp. R. No. 5402, Tr., p. 11):

> ". . . That contract is not valid until the Mediation Board says either the BLE is the bargaining representative for men in the engineers' training program, or it is not. . . ."[1]

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[1]In respect to which administrative body has jurisdiction to decide the BLF&E-BLE dispute, this position of BLF&E counsel was consistent with the National Mediation Board ruling in respect to this dispute, which ruling was made about two weeks previous to this July 2, 1966 statement by BLF&E. The Mediation Board, on June 21, 1966, denied the carriers' application under Section 5,

(Footnote continued on following page)

We respectfully submit that the present litigation would require the District Court to do one or the other, or both, of the following:

> (1) require the District Court to determine the merits of a jurisdictional dispute of a representational nature between the two unions, which type of dispute is within the exclusive jurisdiction of the National Mediation Board, *General Committee* v. *Missouri-Kansas-Texas R. Co.,* 320 U. S. 323 (1943); *Brotherhood of Railway and S. S. Clerks* v. *United Air Lines,* 325 F. 2d 576 (C.A. 6, 1963), cert. granted 377 U. S. 903 (1964), cert. dismissed 379 U. S. 26 (1964);
>
> (2) require the District Court to determine the merits of the dispute over the proper interpretation of collective bargaining agreements, which type of dispute is within the exclusive primary jurisdiction of the National Railroad Adjustment Board, *Slocum* v. *Delaware, L. & W. R. Co.,* 339 U. S. 239 (1950); *Order of Ry. Conductors* v. *Southern Ry. Co.,* 339 U. S. 255 (1950); *Pennsylvania R. Co.* v. *Day,* 360 U. S. 548 (1959); *T.-C.E. Union* v. *Union Pacific R. Co.,* 385 U. S. 157 (1966).

We believe that this Court, in *General Committee* v. *Missouri-Kansas-Texas R. Co., supra,* has taken a broader view of the Mediation Board's jurisdiction

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First of the Railway Labor Act (45 U.S.C. § 155, First) seeking to have that Board determine the jurisdictional dispute between the two unions. The Mediation Board stated that ". . . the question posed involved a question of representation. Such issues are resolved under Section 2, Ninth, of the Railway Labor Act." (Please see p. 14, *supra.*)

under Section 2, Ninth than does the Mediation Board (*Ibid.*, p. 336), and that the Mediation Board has the statutory duty under this section to decide this jurisdictional dispute between the BLF&E and the BLE. This position is also supported by the legislative history of Section 2, Ninth (*Ibid*; please see, also, pp. 43-44, *infra.*).

In any event, whether the jurisdictional dispute involved in the present case is one for resolution by the Mediation Board under § 2, Ninth, is not at all crucial to the correctness of District Court's action in dismissing the complaints for lack of the Court's jurisdiction. If it is not embraced within the ambit of Section 2, Ninth, then the dispute is a jurisdictional one within the exclusive primary jurisdiction of the National Railroad Adjustment Board under § 3, First (i) of the Railway Labor Act, and the District Court did not have jurisdiction to determine the merits of such a dispute.

Petitioners rely (Pet., pp. 12-13) upon *Texas & N. O. R. Co.* v. *Brotherhood of Ry. & S. S. Clerks,* 281 U. S. 548 (1930), and *Virginian Railway Co.* v. *System Federation No. 40,* 300 U. S. 515 (1937). We point out that neither of these cases involved the problem of a jurisdictional dispute between two competing unions. This Court distinguished these two cases upon this basis in the *M. K. T.* case (320 U. S. 323, 335). If the BLF&E had been certified by the Mediation Board as the representative of apprentice locomotive engineers on the L&N and, if the L&N had then negotiated with the BLE and refused to negotiate with the

BLF&E then a situation analogous to that in the *Virginian Ry. Co.* case would be present.

The other cases relied upon by BLF&E: *Fibreboard Corp.* v. *NLRB,* 379 U. S. 203 (1964); *United Industrial Workers of Seafarers* v. *Bd. of Trustees of Galveston Wharves,* 351 F. 2d 185 (C.A. 5, 1965); *Brotherhood of Railroad Trainmen* v. *Central of Ga. Ry. Co.,* 305 F. 2d 605 (C.A. 5, 1962); *Order of Railroad Telegraphers* v. *Chicago & Northwestern Ry. Co.,* 362 U. S. 330 (1960); and *Rutland Railway Corp.* v. *Brotherhood of Locomotive Engineers,* 307 F. 2d 21 (C.A. 2, 1962), have no application to the issues before this Court since they do not even remotely involve an inter-union jurisdictional dispute as to the craft lines of two unions representing separate crafts on a single employer railroad, as does the instant litigation.

Thus, decisions of the Courts below are not inconsistent with applicable decisions of the Courts of Appeals of other circuits. To the contrary, the decisions below are consistent with the decisions of other circuits dealing with craft line determinations and inter-union jurisdictional disputes which hold that the federal courts have no jurisdiction to decide the merits of such disputes. Please see, *e.g., Division No. 14, Order of Railroad Telegraphers* v. *Leighty,* 298 F. 2d 17, 19 (C.A. 4, 1962), cert. den. 369 U. S. 885 (1962); *Ruby* v. *American Air Lines, Inc.,* 323 F. 2d 248 (C.A. 2, 1963), cert. den. 376 U. S. 913 (1964); *Howard* v. *St. Louis-San Francisco Ry. Co.,* 301 F. 2d 905, 908 (C.A. 8, 1966), cert. den. 385 U. S. 986 (1966), and

Southern Pacific Co. v. *Switchmen's Union of North America,* 356 F. 2d 332 (C.A. 9, 1966).

The decisions below are correct. No unsettled question of importance is actually presented, and there is no conflict of decisions. Accordingly, a writ of certiorari should not issue.

ARGUMENT.

REASONS FOR DENYING THE WRIT.

The Decision of the Courts Below Correctly Follows Prior Decisions of This Court Holding That the Courts Lack Jurisdiction Under the Railway Labor Act to Decide Jurisdictional Disputes Between Two Railway Labor Unions.

There can be no real doubt about the fact that a serious dispute exists between the BLE and the BLF&E as to which organization has jurisdiction to represent apprentice locomotive engineers employed by the L&N. Completely underlying each of the complaints below, and inextricably the *vital* part of them, is this jurisdictional dispute between the two unions.

The District Court was not precluded from looking through form to substance in determining the real nature of the controversy before it. *Brotherhood of Ry. Clerks* v. *United Air Lines, Inc.,* 325 F. 2d 576 (C.A. 6, 1963), cert. granted 377 U. S. 903 (1964), cert. dismissed as improvidently granted 379 U. S. 26 (1964). The District Court also properly took judicial notice of the prior litigation before it involving the same parties. *Cf. Howard* v. *St. Louis-San Francisco Ry.*

Co., 361 F. 2d 905 (C.A. 8, 1966), cert. den. 385 U. S. 986 (1966). The District Court also had the right to rely upon undisputed statements of counsel made to the Court concerning the proceedings involving the same parties before the National Mediation Board and the United States District Court for the District of Columbia in Civil Action No. 2060-66. *Oscanyan* v. *Arms Company,* 103 U. S. 261 (1880), cited and relied upon in *Rhoades, Inc.* v. *United Air Lines, Inc.,* 340 F. 2d 481 (C. A. 3, 1965); *United States Hoffman Machinery Corp.* v. *Richa,* 78 F. Supp. 969 (W.D. Mo., 1948). The District Court was also cognizant of the general background of the national "work-rules" dispute as reflected in reported decisions of other federal courts involving the same parties and previously discussed herein (pp. 4-9, 12-13).

It is obvious that the present complaints involve a jurisdictional dispute between the BLF&E and BLE as to which union has the right to negotiate an agreement for apprentice locomotive engineers on the L&N. This is not a dispute over which the courts have jurisdiction.

While BLF&E has thinly veiled its true purpose in Civil Action No. 5402 by artfully drawing a complaint contending that the L&N violated Section 2, Seventh of the Railway Labor Act (45 U.S.C. § 152 Seventh) by inaugurating the apprentice locomotive engineer training program, its true purpose was revealed through its counsel before the District Court on July 2, 1966. BLF&E counsel stated (Supp. R. No. 5402, TR., p. 9):

> "We are asking, on the merits of our complaint, to enjoin the carrier from putting into effect an

engineers' training program which we say is in violation of the Railroad Labor Act. That is the simple issue here—just as simple as it can be."

Going further, BLF&E counsel stated (*Ibid.*, pp. 10-11):

"I want to say this; he mentioned the contract with the carrier and BLE respecting these engineer trainees. We are made aware today of an application to the Mediation Board under Section Six, Two Ninth, to have the engineers declared the bargaining representative of and for these apprentice engineers. That representation may or may never come about. In other words, under Section Six, Two Ninth, there are certain procedures that have to be followed.

"Now, we say that if they have a contract as they say they have with the BLE, that is not a valid contract because the BLE has not been, at this point, designated as the bargaining representative for apprentice trainee engineers.

. . . . . .

"In other words, as of now, the BLE, so far as representing the engineers in the engineers' training, or men in the engineers' training program, is just a non-entity. It does not exist and I don't care what they say about a contract. *That contract is not valid until the Mediation Board says either the BLE is the bargaining representative for men in the engineers' training program, or it is not.* In other words, this action of intervention is now premature unless and until the Mediation Board has passed upon their application for representation." (Emphasis added.)

The District Court in the present cases was in precisely the same position as was the District Court in the case of *Brotherhood of Ry. and S.S. Clerks* v. *United Air Lines, Inc., supra.* In that case the union allegedly sought a determination by the District Court concerning the validity of a collective bargaining agreement. There, as here, the District Court looked through form to substance and held that the threshold question involved an inter-union jurisdictional dispute over which the Court had no jurisdiction because of the trilogy of cases dealing with this subject: *Switchmen's Union of North America* v. *National Mediation Board,* 320 U. S. 297 (1943); *General Committee* v. *Missouri-Kansas-Texas R. Co.,* 320 U. S. 323 (1943); *General Committee* v. *Southern Pacific Co.,* 320 U. S. 338 (1943).

In dealing with the sham pleading of the plaintiff in the *United Air Lines* case, the Court of Appeals stated (325 F. 2d at p. 579):

> "By skillful pleading in this case, appellant has tried to avoid the consequences of these three Supreme Court decisions above cited, which clearly otherwise would be controlling. Appellant contends that the complaint does not ask for an adjudication of a dispute concerning representation rights, but involves a dispute between the representative of employees and a carrier concerning the latter's obligations.
>
> ". . . Looking through form to substance, we agree with the District Court that, although the suit is cast in the form of an action under the law of contracts, it in fact involves a representation

> dispute. Even though an action is brought as one sounding in contract the courts have no jurisdiction 'where "validity" of the contract depends upon the merits of a representation dispute'."

The essential holding of that case was that the mandates of the trilogy of Supreme Court cases cannot be avoided by artfully phrasing a complaint to state a cause of action not founded on the true dispute. There, as here, the basic question concerned the right to represent employees under the Railway Labor Act, and the courts properly look through form to substance in reaching the true nature of such a controversy.

The complaint in Civil Action No. 5829 also attacks the validity of the L&N-BLE apprentice engineer agreement and its implementation (A. 13-28). The BLF&E contends there that the L&N-BLE apprentice engineer program constitutes a violation of Section 2, Second, Third and Fourth of the Railway Labor Act (45 U.S.C. § 152, Second, Third and Fourth). This complaint is similarly founded upon an incorrect assumption by the BLF&E that it has the *exclusive* right to bargain with the L&N in respect to apprentice engineers and in the setting of standards and qualifications of locomotive engineers.[1] Thus, the threshold question presented by this second suit is the jurisdictional dispute between the BLF&E and the BLE.

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[1]There are other patently erroneous assumptions on the part of the BLF&E. For example, the second suit is predicated upon the erroneous and unfounded assumption that the L&N's need all along has been for firemen and not engineers (A. 16-17). We say that this is a patently absurd contention in view of the findings and ruling of Arbitration Board 282 that 90% of the fireman positions in road freight and yard service were unnecessary and could be abolished in accordance with the Award.

Shortly after the effective date of Award 282, in 1964, the L&N did offer a substantial lump-sum payment for voluntary retirement to a number of its older firemen and engineers, who heartily welcomed and encouraged such a program (please see pp. 8-9, *supra*). When the L&N began experiencing a shortage of qualified engineers in 1965, it first attempted to satisfy this need by the training and examination of its remaining firemen in order to qualify them for promotion to engineers (*Ibid.*, pp. 10-11). When the BLF&E resisted this L&N effort and, through the filing of Civil Action No. 5134, partially thwarted this program, it became necessary for the L&N to rely also upon other sources for obtaining qualified locomotive engineers (*Ibid.*, p. 13). By April of 1966, the L&N's need for engineers became so acute that it could not await the eventual resolution of the jurisdictional dispute between the BLF&E and the BLE and, in order to satisfy its need for engineers, it commenced the apprentice engineer program with the agreement and cooperation of the BLE, the duly certified representative of locomotive engineers on the L&N (*Ibid.*, pp. 13-14).[1] By this apprentice engineer program *and* by the promotion of qualified firemen where not prevented by the BLF&E, the L&N has been satisfying its operational needs for qualified locomotive engineers (*Ibid.*, pp. 13-14).

It is therefore apparent that the BLF&E complaint that L&N refused to bargain about its Section 6

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[1]The L&N was not required to await a resolution of the dispute before making the 1966 agreement. Please compare *Ruby* v. *American Airlines, Inc.*, 323 F. 2d 248, 254 (C. A. 2, 1963), cert. den. 376 U. S. 913 (1964).

Notice for the training of apprentice locomotive engineers is founded upon L&N's determination that, under the Railway Labor Act, it was required to negotiate such an agreement with the BLE. From this L&N decision has flowed the existing apprentice locomotive engineer training program conducted with the assistance of the BLE, the bargaining agent recognized by L&N as the labor organization having that statutory right under the Railway Labor Act. We are therefore faced with a classical example of the kind of dispute this Court has held to be not for judicial determination.

As was stated in *General Committee* v. *Missouri-Kansas-Texas R. Co.,* 320 U. S. 323 (1943), where the dispute involves the authority of two railroad unions to represent certain employees in collective bargaining, the issues "are not justiciable—that is to say that Congress by this Act [Railway Labor Act] has foreclosed resort to the courts for enforcement of the claims asserted by the parties" (p. 327-328).

In defining the kind of dispute that is not appropriate for resolution in the federal courts, this Court stated (p. 334-335):

> ". . . It involves a jurisdictional dispute—an asserted overlapping of the interests of two crafts. It necessitates a determination of the point where the authority of one craft ends and the other begins or of the zones where they have joint authority."

Going further, this Court stated (p. 336-337):

> "It seems to us plain that when Congress came to the question of these jurisdictional disputes, it

> chose not to leave their solution to the courts. As we have already pointed out, Congress . . . selected different machinery for their solution. Congress did not leave the problem of inter-union disputes untouched. It is clear from the legislative history of § 2, Ninth that it was designed not only to help free the unions from the influence, coercion and control of the carriers but also to resolve a wide range of jurisdictional disputes between unions or between groups of employees. . . . However wide may be the range of jurisdictional disputes embraced within § 2, Ninth, Congress did not select the courts to resolve them. To the contrary, it fashioned an administrative remedy and left that group of disputes to the National Mediation Board. If the present dispute falls within § 2, Ninth, the administrative remedy is exclusive. If a narrower view of § 2, Ninth is taken, it is difficult to believe that Congress saved some jurisdictional disputes for the Mediation Board and sent the parties into the federal courts to resolve the others."

The second of the trilogy of cases, all of which were handed down on the same day, was *Switchmen's Union of North America* v. *National Mediation Board,* 320 U. S. 297 (1943), wherein SUNA and some of its members questioned the determination of craft lines by the National Mediation Board incident to a representation election. The result of the Mediation Board's determination was to include several small groups of yard employees represented by SUNA among a much larger group throughout the railroad. As a result, in the election that followed, the Brotherhood

of Railroad Trainmen was designated as the collective bargaining representative for the system-wide craft which included the previously independent smaller groups. SUNA filed suit asking the court to cancel the election held by the Mediation Board and to define the craft along the lines desired by it. The District Court took jurisdiction of the dispute and upheld the decision of the Mediation Board. This Court stated (p. 300): "We do not reach the merits of the controversy. For we are of the opinion that the District Court did not have the power to review the action of the National Mediation Board in issuing the certificate."

As a final *caveat* on the federal courts' jurisdiction in these matters of inter-union representation disputes, the Court dealt with its prior decisions holding that the federal courts had jurisdiction to prevent the carrier from interfering with the rights of employees to freely select their bargaining representative such as: *Texas & N.O. R. Co.* v. *Brotherhood of Ry. & S.S. Clerks,* 281 U. S. 548 (1930), and *Virginian Railway Co.* v. *System Federation No. 40,* 300 U. S. 515 (1937). The BLF&E (Pet., pp. 12-13), places primary reliance upon these two cases as supporting the District Court's jurisdiction in the present cases. However, in both of these cases, the carrier was accused of fostering a company union to the detriment of regularly organized independent national unions. The District Courts were held to have jurisdiction to insure compliance with the mandates of the Railway Labor Act prohibiting the carrier from interfering with the free selection of a

collective bargaining representative. However, in the *SUNA* case, this Court distinguished that type of controversy from those involving inter-union craft line disputes, recognizing that, in the absence of such a jurisdictional dispute, the federal courts would have jurisdiction to enforce the mandatory collective bargaining requirements of the Railway Labor Act.

This Court also again distinguished the *Clerk's* case and the *Virginian Ry. Co.* case from one involving a jurisdictional dispute in *General Committee* v. *MKT R. Co.*, 320 U. S. 323, 335. If the BLF&E had been certified by the Mediation Board as the representative of apprentice locomotive engineers on the L&N and, if the L&N had then negotiated with the BLE and refused to negotiate with the BLF&E then a situation analogous to that in the *Virginian Ry. Co.* case would be present.

The other cases relied upon by BLF&E: *Fibreboard Corp.* v. *NLRB*, 379 U. S. 203 (1964); *United Industrial Workers of Seafarers* v. *Bd. of Trustees of Galveston Wharves*, 351 F. 2d 183 (C.A. 5, 1965); *Brotherhood of Railroad Trainmen* v. *Central of Ga. Ry. Co.*, 305 F. 2d 605 (C.A. 5, 1962); *Order of Railroad Telegraphers* v. *Chicago & Northwestern Ry. Co.*, 362 U. S. 330 (1960); and *Rutland Railway* v. *Brotherhood of Locomotive Engineers*, 307 F. 2d 21 (C.A. 2, 1962), have no application to the issues before this Court since they do not even remotely involve an inter-union jurisdictional dispute as to the craft lines of two unions representing separate crafts on a single employer railroad, as does the instant litigation.

JURISDICTION OF THE NATIONAL MEDIATION BOARD UNDER § 2, NINTH OF THE RAILWAY LABOR ACT (45 U.S.C. § 152, NINTH).

Petitioners' reliance (Pet., pp. 19-20) on *dictum* appearing in *Brotherhood of Railroad Trainmen* v. *National Mediation Board,* 135 F. 2d 780, 782 (C.A. D.C., 1943), is misplaced. That *dictum* and the National Mediation Board's interpretation that it lacks authority to determine craft line disputes was discredited in *General Committee* v. *Missouri-Kansas-Texas, supra,* where, in footnote 11, this Court commented (320 U. S. page 336):

> "It is apparently the view of the National Mediation Board that § 2, Ninth was designed to cover only those disputes entailing an election by employees of their representatives. See *Brotherhood of Railroad Trainmen* v. *National Mediation Board,* 135 F. 2d 780, 782. In an election case the Board may have to make a preliminary determination as to the eligibility of voters involving the type of problem presented here. See *Brotherhood of Railroad Trainmen* v. *National Mediation Board,* 88 F. 2d 757, dealing with the question whether brakemen having seniority as conductors could vote in the conductors' election."

Then, in the body of the opinion to which the footnote is appended, this Court said (p. 336):

> ". . . However wide may be the range of jurisdictional disputes embraced within § 2, Ninth, Congress did not select the courts to resolve them. To the contrary, it fashioned an administrative remedy and left that group of disputes to the National Mediation Board."

We think it is clear that this Court has taken a broader view of the Mediation Board's jurisdiction under Section 2, Ninth, than does the Mediation Board itself. This is most apparent from Note 11 (p. 336):

> ". . . It is clear from the legislative history of § 2, Ninth that it was designed not only to help free the unions from the influence, coercion and control of the carriers but also to resolve a wide range of jurisdictional disputes between unions or between groups of employees. . . ."

Section 2, Ninth was added by the 1934 amendments to the statute (48 Stat. 1185). Those amendments were drafted by Joseph B. Eastman, then the Federal Co-ordinator of Transportation, and he made entirely clear that Section 2, Ninth would empower the NMB to decide jurisdictional disputes such as we have here. Thus, in the Hearings on H.R. 7650 before House Committee on Interstate and Foreign Commerce, 73d Cong., 2d Sess., at 45, the following colloquy occurred after Commissioner Eastman was asked whether the phrase "craft or class" as used in Section 2, Fourth was defined in the bill:

> "Commissioner Eastman: No. We thought of that, as to whether or not it was necessary to define craft or class, but those are words which have been used in labor parlance for a very long time, and I think there would be no difficulty in determining what is a craft or class of employees.
>
> "Mr. Wolverton: You do not think that without definition they might create disputes between

the different classes of employees as to the jurisdiction of each?

"Commissioner Eastman: No; and if there are any disputes I think that matter is sufficiently covered by the provisions of the ninth paragraph, which provides for the settlement of such disputes, or rather, provides the tribunal which shall have power to consider and determine such disputes."

This matter was raised again shortly thereafter (*Ibid.*, at 57), as follows:

"Mr. Huddleston: How would we resolve an issue where there was a conflict of jurisdiction as to classes and crafts, such, for illustration, as comes up in the classification of employees. We have had some pretty bitter disputes, we will say, between the carpenters and the sheet-metal workers over who should put in metal window frames. That is just an illustration of what sometimes happens, and the trouble has been that nobody could say whether the man doing that work was a carpenter or a sheet-metal worker. What would you do with a situation such as this under this bill?

"Commissioner Eastman: It is the intent that that would be handled under the paragraph ninth that I have discussed."

In any event, whether the jurisdictional dispute involved in the present case is one for resolution by the Mediation Board under § 2, Ninth, is not at all crucial to the correctness of the District Court's action in dismissing the complaints for lack of the Court's juris-

diction.[1] If it is not embraced within the ambit of Section 2, Ninth, then the dispute is a jurisdictional one within the exclusive primary jurisdiction of the National Railroad Adjustment Board under § 3, First (i) of the Railway Labor Act, and the District Court did not have jurisdiction to determine the merits of such a dispute (Appendix, p. 61, *infra.*).

JURISDICTION OF THE NATIONAL RAILROAD ADJUSTMENT BOARD UNDER § 3, FIRST (i) OF THE RAILWAY LABOR ACT (45 U.S.C. § 153, FIRST (i)).

If the BLF&E's claimed right to *exclusivity* in the representation of *all* individuals who may become locomotive engineers is not actually founded upon a claimed *statutory* right under the Railway Labor Act (which statutory right is for determination by the National Mediation Board under § 2, Ninth), then the BLF&E must necessarily predicate its alleged right to exclusivity upon some provision of an *agreement*. Thus, if it avoids a classification of this jurisdictional dispute as being one of a representational nature for resolution by the National Mediation Board, the BLF&E simply runs into another type of jurisdictional dispute which is within the exclusive jurisdiction of the National Railroad Adjustment Board. We strongly dispute the BLF&E's interpretations of Article 26, Sections 9 to

[1]Indeed, even the National Mediation Board recognizes that the courts do not have jurisdiction to settle inter-union controversies of this nature. In its brief (pp. 23, 43) filed in *National Mediation Board* v. *Brotherhood of Locomotive Engineers*, Appeal No. 22158, in the Court of Appeals for the District of Columbia, that Board recognized that the Court's denial of jurisdiction of BLF&E's complaints in the instant litigation was correct. The Board stated that "The result reached by the Sixth Circuit seems correct and wholly consistent with our position" (p. 43).

12, of the L&N-BLF&E collective bargaining agreement (R. No. 5402, Doc. 2, Ex. 1).

It is well settled that no court, state or federal, has jurisdiction to decide the merits of a dispute over the proper interpretation of a collective bargaining agreement between a railroad labor union and a railroad. *Slocum* v. *Delaware, L.&W. R. Co.,* 339 U. S. 239 (1950); *Order of Railway Conductors* v. *Southern Ry. Co.,* 339 U. S. 259 (1950); *Pennsylvania R. Co.* v. *Day,* 360 U. S. 548 (1959); *Brotherhood of Locomotive Engineers* v. *Louisville & N. R. Co.,* 373 U. S. 33 (1963); and *T.-C.E. Union* v. *Union Pacific R. Co.,* 385 U. S. 157 (1966).

Since the Court has no jurisdiction to decide the merits of a dispute involving the proper interpretation of the collective bargaining agreement, we will not present any detailed arguments concerning such a dispute. However, we do desire to make certain basic points in order to show this Court, as we did the courts below, that there is, in fact, a serious dispute concerning the meaning which BLF&E attributes to Article 26 of the agreement.

We make it clear, as we have always done to proper representatives of the BLF&E and as we did to the courts below, that the engineer training program commenced on the L&N in April, 1966, was not instituted for the purpose of preventing the promotion of any L&N firemen to engineers, if qualified. Nor has the training program, in fact, operated to prevent the promotion of any L&N firemen. The firemen's craft continues to be a source or a pool from which the carrier

obtains individuals who may become qualified to become locomotive engineers. However, the firemen's craft has never been and is not now the *exclusive* source for obtaining locomotive engineers on the L&N. In the past, it has been an important source from which the carrier obtained individuals for the carrier's officials to teach, instruct, examine and qualify as locomotive engineers (a part of such training and instruction has always been accomplished with the cooperation of the senior locomotive engineers). However, there is now and will continue to be an insufficient number of firemen from which the carrier can meet all its needs for locomotive engineers (R. 5829, Doc. 10, pp. 5-6, 9, 11).

The L&N entered into the agreement of April 28, 1966, with the BLE when it became apparent that it would not be able to fill all of its requirements for locomotive engineers by promoting locomotive firemen. A program of training engineers so that they may be available for employment as engineers has become a necessity. L&N did not violate any provision of the collective bargaining agreement between L&N and BLF&E when it entered into the agreement on April 28, 1966, with the BLE and commenced its program to train apprentice engineers. The L&N will also continue to respect the right of all its firemen to promotion, when qualified and as needed as engineers (*Ibid.*, pp. 5-7, 9, 10-12).

The collective bargaining agreement is not the *source* of the right of L&N's Management to do all things necessary to safely and efficiently operate the

railroad. That right emanates from its franchise and is inherent in its power to operate a railroad. Accordingly, one does not search for a provision in a collective agreement *authorizing* L&N to set up a training program to instruct individuals in regard to all things necessary to safely and efficiently operate its diesel locomotives. One looks only to determine whether, by agreement, L&N has been *prohibited* from inaugurating such a training program or whether it has contracted away some of its inherent power by agreeing with a labor organization concerning the substance of such a program.[1]

There is no provision in the collective bargaining agreement which prohibits L&N from establishing an apprentice locomotive engineer training program. Nor is there any provision in the collective bargaining agreement which requires *all* locomotive engineers to be taken *exclusively* from the ranks of firemen. In fact, Section 9(a) of Article 26 specifically provides that on seniority districts where firemen are required to fire three and less than four years, one fireman will be promoted to each engineer hired, and this quota is obviously applicable only where there are both categories of men available and desiring to fill a vacancy of locomotive engineer. If there are no firemen qualified for promotion, then certainly the L&N could obtain all its engineers from other sources. Conversely, if there

[1]The relationship of employer and employee is not dependent upon a collective bargaining agreement. "The common law rights inherent in such relationship still exists except to the extent that they may be modified by legislation or by the specific contract between the employer and the employee." *United States Steel Corp.* v. *Nichols*, 229 F. 2d 396, 399 (C.A. 6, 1956), cert. denied 351 U. S. 950 (1956).

are sufficient firemen qualified for promotion to engineer and no other person qualified as an engineer seeking to fill an engineer vacancy, then certainly the L&N could obtain all its engineers by promoting firemen. It is quite another thing, however, to argue, as does the BLF&E, that, *regardless of the availability of persons in any category,* all locomotive engineers must come *exclusively* from the ranks of firemen. Moreover, we strongly dispute the BLF&E's very limited interpretation of their term "hired engineer" as being limited exclusively to individuals who had become engineers by promotion from the ranks of firemen on some other railroad. The very rules relied upon by the BLF&E actually affirm the L&N's common law right to hire engineers, and the L&N does not agree that its right is limited to engineers who have been promoted from firemen to the position of engineers on other railroads. We strongly take issue with such an interpretation of the collective bargaining agreement relied upon by the BLF&E (R. 5829, Doc. 10, pp. 10-12).

There is a second aspect of the BLF&E's contention involving Article 26 that needs to be set straight. The BLF&E erroneously assumes that it has the right, to the complete exclusion of the BLE, to train all of L&N's prospective locomotive engineers and to determine their qualifications for becoming L&N engineers. We strongly take issue with any such interpretation of Article 26.

The training, instructions, standards, the nature of all examinations and other qualifications for a fireman to be promoted to a locomotive engineer involve mat-

ters of management prerogative and are not provided for in Article 26, or in any other collective bargaining agreement with any other labor organization on the L&N, except that Article 26 provides that a fireman shall be examined for promotion when he has completed and turned in to the proper company officer his first, second and third year mechanical examination papers, and provides that a fireman will not be promoted to engineer unless he has had at least three years' road experience.[1] The agreement accords no rights whatsoever to the BLF&E to determine the qualifications of a locomotive engineer. Management determines such qualifications and prepares and gives the examination for promotion from fireman to engineer.

The BLF&E is accorded no agreement right by Article 26 to formulate with the carrier the *substance* of any training program for an individual to become a locomotive engineer, to determine the nature of instructions given such an individual, to determine the contents of examinations to be given such an individual or to otherwise determine the standards and qualifications of a locomotive engineer. These are matters of managerial prerogative.

With regard to any BLF&E claim to exclusivity based on Article 26, it is significant that substantially identical provisions to those contained in Paragraphs 2 to 12, inclusive, of Article 26 of the L&N-BLF&E agreement appear also in Article 26 of the L&N-BLE agreement. These are known as "joint rules" (R. 5402,

[1]This latter provision restricting promotion from a fireman to engineer unless the fireman has three years' *road* experience has been waived on many occasions in the past.

Doc. 2, p. 3). Thus, it is difficult to conceive how those paragraphs in Article 26 of the L&N-BLF&E agreement could possibly be effective to confer *exclusive* authority upon the BLF&E. The simple answer is that there is *nothing* contained in Article 26 of *either* of the agreements which confers any *agreement* right upon either the BLE or the BLF&E to formulate with the carrier the *substance* of any training program for an individual to become a locomotive engineer, to determine the nature of instructions given such an individual, to determine the contents of examinations to be given such an individual or to otherwise determine the standards and qualifications of a locomotive engineer.

The right of the BLE to negotiate an apprentice engineer training program with the L&N is not predicated upon any provision in Article 26 of its agreement with the L&N. The BLE's right to negotiate an apprentice engineer training program with the L&N is based upon the fact that it has been certified by the National Mediation Board under the provisions of Section 2, Ninth of the Railway Labor Act (45 U.S.C. § 152, Ninth) as the statutory representative for the entire craft or class of locomotive engineers on the L&N.

There is nothing in the agreement which accords to the BLF&E the right to determine the qualifications of a locomotive engineer, nor could there lawfully be since the BLF&E has no *statutory* right under the Railway Labor Act to negotiate with the L&N, nor the L&N with it, concerning the qualifications of a skilled

craft or class which the BLF&E is not authorized to represent on the L&N.

Insofar as the dispute over the proper interpretation of Article 26 is concerned, it is for determination by the National Railroad Adjustment Board under Section 3 of the Railway Labor Act (45 U.S.C. § 153). Such a dispute is equally jurisdictional since Article 26 also is a part of the L&N-BLE collective bargaining agreement and is commonly referred to as a "joint rule." Compare the procedure involved in *T.-C.E. Union* v. *Union Pacific R. Co.*, 385 U. S. 157 (1966). Insofar as any asserted *statutory* right of BLF&E to negotiate concerning the qualifications of locomotive engineers is concerned, the dispute is one for the National Mediation Board under Section 2, Ninth of the Railway Labor Act (45 U.S.C. § 152, Ninth).

The Decisions of the Courts Below Are Not in Conflict With Applicable Decisions of the Court of Appeals of Other Circuits.

Counsel erroneously argue (Petition, p. 14) that the decisions of the courts below in these cases conflict with the decision of the Fifth Circuit Court of Appeals in *United Industrial Workers* v. *Board of Trustees of Galveston Wharves,* 351 F. 2d 183 (1965).

BLF&E's contentions in this regard are that L&N unlawfully refused to negotiate with it concerning its Section 6 Notice "to negotiate a training program for firemen" (Petition, p. 14). Petitioners argue that the courts below should have temporarily enjoined L&N from progressing the apprentice locomotive engineer

training program pending exhaustion of the Railway Labor Act procedures for handling major disputes, that is, disputes involving proposals to change the existing agreements or to make new agreements.[1] Petitioners further erroneously argue that the courts below should have ordered L&N to negotiate with BLF&E concerning its Section 6 Notice.

The BLF&E Section 6 Notice of March 25, 1965, is in reality a proposal to negotiate an apprentice locomotive engineer training program agreement. It patently seeks to establish an apprenticeship training program for one to become an engineer. Euphemistic titles of "student locomotive helper," "locomotive helper trainee" and "locomotive helper (qualifying for promotion)" are used. Article C of the notice provides that these terms are synonymous with the term "fireman." Article E provides that such a trainee shall receive seniority as a locomotive engineer upon completion of the program. We submit that, stripped of its obscurantist titles, this Section 6 Notice pertains to an apprenticeship training program for locomotive engineers.

This Section 6 Notice, as well as similar BLF&E notices served on other railroads on November 15, 1965, was one of the subjects at issue in *Brotherhood of Locomotive Engineers* v. *National Mediation Board, et al.*, 284 F. Supp. 344 (D.C. D.C., 1968). Therein, the district court found that since the service of these

[1]The BLF&E did not seek to have the Court maintain the *status quo* pending any administrative determination of the jurisdictional dispute. BLF&E sought to have the Court determine the *merits* of such a dispute.

Section 6 Notices, a BLE-BLF&E jurisdictional dispute has existed (pp. 351-352), and that the National Mediation Board has exclusive jurisdiction to resolve it (p. 352). The court ordered the National Mediation Board to take jurisdiction and determine whether BLE or BLF&E should represent the employees involved. This decision is now pending on appeal in the Court of Appeals for the District of Columbia Circuit.[1]

It is the existence of an inter-union jurisdictional dispute which distinguishes the case at bar from the Fifth Circuit Court of Appeals decision in *United Industrial Workers* v. *Board of Trustees of Galveston Wharves, supra.* In the *Galveston Wharves* case there was no question concerning the union's right to represent the employees. Therein, after the union formally notified the employer of its proposal to change the collective bargaining agreement, the employer leased the entire facility to the Port Richmond Elevator Company. Thereafter, the union served a Section 6 Notice which called for the negotiation of an agreement covering "shut down, leasing or subcontracting." When negotiations failed to resolve the dispute, the union

[1]The final outcome of this case does not affect the validity of the judgments below. In the case at bar the essential findings are: (1) that there is a jurisdictional dispute between BLF&E and BLE concerning which organization is empowered to negotiate in behalf of apprentice engineers, and (2) that the federal courts do not have jurisdiction to resolve such a jurisdictional dispute.

On the other hand, the Washington lawsuit goes two steps further, holding: (3) that the National Mediation Board has power to decide the dispute, and (4) and that it should exercise that power and resolve the controversy. Whatever may be said about points 3 and 4, the law is and for many years has been crystal clear about points 1 and 2. Federal courts do not have jurisdiction to resolve disputes between a railroad labor union and a railroad growing out of an inter-union jurisdictional dispute.

went on strike and filed suit in the district court seeking an injunction against consummation of the lease pending exhaustion of the major dispute procedures of the Railway Labor Act.

The Fifth Circuit Court of Appeals held that, by leasing all of the facilities, the employer had unilaterally changed "working conditions." The district court's finding that it lacked jurisdiction was reversed, and the case was remanded for further proceedings, which, including several appeals, continue unabated at the time of this writing. Please see *United Industrial Workers* v. *Board of Trustees of Galveston Wharves,* 400 F. 2d 320 (C.A. 5, 1968).

BLF&E would compare the leasing of facilities by Galveston Wharves to L&N's execution of the apprentice locomotive engineer agreement with BLE. The differences are so obvious that we find it impossible to believe the contention is seriously made. BLF&E has available to itself either one or the other of two fully adequate administrative remedies. If it wishes to contest the statutory power of the BLE to negotiate concerning the subject matter of individuals training to become locomotive engineers, it may do so by filing a Section 2, Ninth protest before the National Mediation Board. On the other hand, if BLF&E seeks to assert only rights arising under Article 26 of the L&N-BLF&E agreement, it may do so by submitting this dispute to the National Railroad Adjustment Board.

Further, the decisions of the courts below are consistent with the decisions of other circuits dealing with craft-line determinations and inter-union jurisdic-

tional disputes. In *Division No. 14, Order of Railroad Telegraphers* v. *Leighty,* 298 F. 2d 17, 19 (C.A. 4, 1962), certiorari denied, 369 U. S. 885 (1962), an intra-union jurisdictional dispute involving integration of seniority rosters after a railroad merger was held to be within the exclusive jurisdiction of the National Mediation Board. In *Howard* v. *St. Louis-S. F. Ry. Co.,* 301 F. 2d 905, 908 (C.A. 8, 1966), a complaint alleging hostile racial discrimination founded in an allegedly arbitrary classification of Negro trainmen as "train porters" and requesting the court to reclassify such employees as "brakemen" was held not justiciable since it requested a re-determination of class or craft lines, the court holding that such a dispute is one for the National Mediation Board. In *Southern Pacific Co.* v. *Switchmen's Union of North America,* 356 F. 2d 332 (C.A. 9, 1966), it was held that a dispute as to which of two unions was entitled to represent certain yard trainmen involved a determination of craft lines and was within the jurisdiction of the National Mediation Board. In addition, the carrier was relieved of negotiating with one of the unions concerning its Section 6 Notice which proposed an agreement defining the craft lines along the basis of its own proposals. The court held that such a notice was invalid as seeking to obtain from the carrier a class determination which could only be awarded by the National Mediation Board.

Moreover, L&N's actions in this matter have followed the practices of others which have met with court approval. Had L&N's need for engineers not

been so acute by 1966, it might have been able to defer entering into any agreement with either of the unions pending a resolution of this jurisdictional dispute. But L&N could not wait, and the BLE threatened to strike if L&N negotiated with BLF&E concerning apprentice engineers. L&N believed and still believes that BLE is the appropriate collective bargaining representative on the L&N to make agreements on behalf of apprentice locomotive engineers.[1] Under these circumstances, L&N was not required to await a resolution of the dispute before making the 1966 agreement. In *Ruby* v. *American Air Lines, Inc.*, 323 F. 2d 248 (C.A. 2, 1963), cert. den. 376 U. S. 913 (1964), a dispute developed between the international headquarters of the pilots' union and the local organization on American Air Lines during the negotiations of the crew complement dispute. Unwilling to accept the dictates of the international headquarters, American's pilots formed their own union, Allied Pilots Association, and obtained authorization cards from an overwhelming majority of American's pilots. Faced with a strike threat from Allied, the carrier negotiated an agreement with it.

In affirming the district court's dismissal of a lawsuit filed by the international union, the Second Circuit Court of Appeals stated (p. 254):

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[1]The BLE had been certified by the National Mediation Board as the representative for locomotive engineers employed by the L&N. Traditionally, throughout all industry, including the railroad industry, apprentices, whose only work consists of learning the trade of the skilled craft, have been represented by the bargaining representative of that skilled craft (R. 5402, Doc. 16, p. 4; R. 5829, Doc. 10, p. 7).

> ". . . American recognized Allied only when possessed of substantial evidence that Allied represented an overwhelming proportion of its pilots and when threatened with a strike if it refused recognition. Under such circumstances recognition by an employer who has not been guilty of a relevant unfair labor practice need not await certification, although he acts at peril of being right . . .".

The court also held, consistently with the decisions handed down in other circuits, that the dispute between the international and the separately organized local union was a jurisdictional dispute within the jurisdiction of the National Mediation Board.

The determinative distinction between these decisions and *Galveston Wharves* is that they all involve questions relating to the determination of craft lines of a collective bargaining unit. In each instance the courts held they lacked jurisdiction to resolve such issues. Regardless of the merits of the decision in *Galveston Wharves,* it is clear that the court in handing down its decision did not consider itself as stating law different from that decided in the other federal circuits. Had the case dealt with a union jurisdictional dispute, the court would certainly have discussed the area of responsibility carved out for the National Mediation Board. Under the facts there presented, that problem was not in issue and this distinguishing factor makes the case inapplicable to the instant controversy.

We submit that there is no conflict in authority among the decisions handed down in the various federal

circuits and the BLF&E's fancied contention that one exists, does not serve as a basis upon which this Court should grant a writ of certiorari to the Sixth Circuit Court of Appeals and take jurisdiction of the instant case.

CONCLUSION.

The decision below is correct and follows prior decisions of this Court. No unsettled question of importance is presented, and there is no conflict of decisions. Accordingly, a writ of certiorari should not issue.

Respectfully submitted,

JOHN P. SANDIDGE,
WOODWARD, HOBSON & FULTON,
1805 Kentucky Home Life Building,
Louisville, Kentucky 40202,

PHILIP M. LANIER,
JOSEPH L. LENIHAN,
MARVIN D. JONES,
EUGENE W. HERDE,
DAVID M. YEARWOOD,
908 West Broadway,
Louisville, Kentucky 40201,

Attorneys for Respondent, Louisville and Nashville Railroad Company.